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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
vs.
PATRICK M. O'RILEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

ROBERT S. BESSER
Counsel of Record

CHRISTOPHER CHAPIN

BESSER & CHAPIN

Suite 600
12011 San Vicente Boulevard
Los Angeles, California 90049
(213) 476-8229

Attorneys for Petitioner
Union Oil Company of California

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

Do federal courts have exclusive jurisdiction over claims brought under the Petroleum Marketing Practices Act, 15 U.S.C. §2801, *et seq.*?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
vs.
PATRICK M. O'RILEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, affirming the judgment of the Superior Court of Los Angeles County, is attached hereto as Appendix "A." The order by the California Supreme Court denying Petitioner's petition for review is attached hereto as Appendix "B."

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Order of the California Supreme Court, denying review of the judgment of the Court of Appeal of the State of California, was filed on March 13, 1991.

Jurisdiction is invoked under the provisions of 28 United States Code, §1257(a).

STATUTORY PROVISIONS APPLICABLE

Petroleum Marketing Practices Act, 15 United States Code, §2801, *et seq.* ("PMPA") governing the grounds and procedures for termination and nonrenewal of petroleum marketing franchises. The pertinent text of 15 United States Code, §2805 and §2806 is set forth in Appendix "C."

STATEMENT OF THE CASE

This is an action between a service station franchisee, Respondent Patrick M. O'Riley ("O'Riley") and a petroleum marketing franchisor, Union Oil Company of California ("Union")[1] arising out of Union's termination of O'Riley's franchise.

The action was originally commenced by Union seeking to recover from O'Riley money owed Union prior to the termination. In response to the complaint, O'Riley cross-complained against Union alleging, among other

---

[1] Union Oil Company of California is a fictitious business name of Unocal Corporation. Its only non wholly-owned subsidiary is Union Exploration Partners, Ltd.

things, a wrongful termination of his franchise under the PMPA.

Subsequent to the entry of the trial court's judgment, entered in favor of Union on two state law claims, and against Union on the PMPA claim, the California Court of Appeal, in the case of *Niakan v. Samaan* (1988) 199 Cal.App.3d 716, held that jurisdiction of PMPA claims is exclusively federal. The *Niakan* Court relied on and adopted the reasoning of a federal district court case *Rustom v. Atlantic Richfield Co.*, 618 F. Supp. 210 (C.D.Cal. 1985).

Based on the holdings of *Rustom* and *Niakan*, Union appealed the PMPA portion of the judgment on the ground that the trial court had lacked jurisdiction. The California Court of Appeal agreed and reversed the entire judgment.

O'Riley then sought review in the California Supreme Court. Review was denied on February 1, 1990.

O'Riley then petitioned this Court, which vacated the judgment of the Court of Appeal and remanded the case for further consideration in light of its recent holding in *Tafflin v. Levitt*, 493 U.S. ___, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), that jurisdiction over actions brought under the Racketeer and Corrupt Organizations Act ("RICO") is concurrent.

The Court of Appeal, upon reconsideration, concluded that "our earlier opinion, relying primarily on *Rustom v. Atlantic Richfield Co.* (D.C. Cal. 1985) 618 F. Supp. 210, was in error and that state courts *do* enjoy concurrent jurisdiction with the federal courts over cases based upon the PMPA." (Opinion of the Court of Appeal, hereinafter "Opinion," Appendix "A" hereto, p. 2.)

Union petitioned the California Supreme Court for Review of the Court of Appeal's decision, and its

petition was denied on March 13, 1991. (Order of the California Supreme Court, Appendix "B.")

REASONS FOR GRANTING THE WRIT

I. This Petition Should be Granted Because There is an Irreconcilable Conflict Among State Courts of Last Resort Interpreting an Important Federal Statute.

In the case of *Johnson v. Mobil Oil Corporation* (1989) 560 A.2d 124, the Supreme Court of Pennsylvania held that jurisdiction over claims brought under the PMPA is exclusively federal. To the contrary, the Maine Supreme Court has held that jurisdiction is concurrent. *C.N. Brown Co. v. Gillen* (1990) 569 A.2d 1206.[2]

Not only is this a direct conflict among state courts of last resort deciding a federal question, but the conflict emphasizes the problem created by a rule that jurisdiction is concurrent: Those involved in the petroleum marketing industry cannot rely on a nation-wide and uniform interpretation of this federal statute, a statute which was expressly designed to establish such certainty and uniformity.

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[2] There are now two intermediate appellate court opinions in California which have directly contradictory holdings: *Niakan v. Samaan* (1988) 199 Cal.App.3d 716, holds that jurisdiction of PMPA claims is exclusively federal; and the Court of Appeal in this case has held that jurisdiction is concurrent. The California Supreme Court denied review of both decisions.

II. Jurisdiction Over PMPA Claims was Intended by Congress to be Exclusively Federal and the Analysis of RICO Jurisdiction Made by This Court in *Tafflin* Supports Rather Than Detracts From That Principle.

The principle that federal courts have exclusive jurisdiction of actions under the PMPA remains valid even when considered in light of this Court's holding that federal courts do not have exclusive jurisdiction over actions under the Racketeering and Corrupt Organizations Act ("RICO"). *Tafflin v. Levitt*, 493 U.S. ___, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990).

The analytical framework for resolving the issue of exclusive versus concurrent jurisdiction of a federal statute, based on principles which have "remained unmodified through the years," was stated in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) and restated in *Tafflin, supra.*:

> "Congress . . . may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by *unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests*. [citations omitted]" 107 L.Ed.2d at 894. (Emphasis added.)

It is conceded that there is no explicit grant of exclusive federal court jurisdiction in the PMPA. However,

the legislative history of the PMPA contains an "unmistakable implication" of exclusive federal jurisdiction and the nature and purpose of the PMPA establishes the "clear incompatibility between state court jurisdiction and federal interests." The *Tafflin* Court correctly found both these factors lacking in the legislative history and purpose of RICO. Thus, *Tafflin* does *not* alter the validity of exclusive federal jurisdiction over PMPA claims.

The *Tafflin* Court based its decision on its findings that: (1) there was ". . . no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims . . . ." (107 L.Ed.2d at 895) and; (2) there was "no clear incompatibility between state court jurisdiction over civil RICO actions and federal interest." (107 L.Ed.2d at 898.)

The contrary is true with regard to the PMPA. It is evident from the reports of both the Senate and House debates on the PMPA that Congress intended to create a single, uniform set of regulations as a part of striking a balance between the need of service station dealers for protection from arbitrary termination of their franchises, and the need of the oil companies to develop nationwide marketing plans — thereby assuring an uninterrupted supply of an indispensable commodity:

> "Just as remedying the disparity in bargaining power between franchisors and franchisees provides a need for this legislation, *federal legislation is also needed in order to establish uniform guidelines regarding the franchise relationship.*

> In recent years *the friction between franchisors and franchisees in marketing of motor fuels has become so great that is has threatened adverse impacts upon the Nation's motor fuel distribution and marketing system.* Numerous States have initiated various legislative actions to address these petroleum product franchising problems. These actions have, unfortunately, resulted in an uneven patchwork of rules governing franchise relationships which differ from State to State.
>
> *Needed is a single, uniform set of rules* governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal of a franchise relationship." House Report No. 95-161, 95th Cong., 1st Sess. at 16 (1978). (Emphasis added.)

The *Tafflin* Court pointed out that RICO deliberately incorporates and uses state law to define the "predicate acts" upon which RICO liability is based. 107 L.Ed.2d at 898 (citing 18 U.S.C. §1961(1)(A) which lists state law offenses constituting predicate acts). The PMPA deliberately *eliminates* state laws (see, 15 U.S.C. §2806) and establishes uniform federal regulations upon which both petroleum marketing franchisors and franchisees can rely.

Thus, the PMPA was enacted in order to abolish conflicting state laws both to protect franchisees from

wrongful termination and to assure franchisors of uniformly applied federal laws. In contrast, the *Tafflin* Court correctly notes that the legislative history of RICO establishes that Congress' "attention was focused solely on whether to provide a private right of action" for violation of a criminal statute. 107 L.Ed.2d at 896.

In short, the analysis made by the Supreme Court in *Tafflin*, when applied to the nature, purpose and history of the PMPA, compels an opposite conclusion than the Court reached with respect to RICO and therefore the holding in *Tafflin* is not controlling with respect to the PMPA.

III. The Presumption of Concurrent Jurisdiction of the PMPA is Rebutted by The Intent of Congress to Provide a National Regulatory Scheme Overseen by an Impartial Federal Judiciary.

"To rebut the presumption of concurrent jurisdiction, the question is . . . whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal." *Tafflin*, 107 L.Ed.2d at 896.

Representative Dingell, Chairman of the House Subcommittee on Energy and Power, while introducing the PMPA, expressed the unmistakable intent of Congress in enacting this legislation:

> "The *key to this legislation* is the balance which is struck by including flexibility in the grounds which justify termination or nonrenewal and simultaneously requiring that the franchisor

> prove to *an impartial arbiter, a Federal court judge*, that permissible grounds for termination or nonrenewal do in fact exist. Franchisee rights under this bill are, as a result, more meaningful than limitations on franchisor conduct, provided in some State laws, which are arguably more stringent. The theoretical protections afforded by these State laws are often not enforceable in practice, due to procedural advantages enjoyed by the franchisor." 95th Cong., 1st Sess., Congressional Record — House, Vol. 123, Part 9, p. 10383 (1978). (Emphasis added.)

The Court in *Tafflin* found no "smoking gun" in the legislative history by which RICO sponsors indicated an intent to commit civil RICO to the federal courts. (107 L.Ed.2d at 896.) The legislative history of the PMPA, however, contains just such a "smoking gun" in the statement of Representative Dingell that the franchisor must prove its right to terminate to *"an impartial arbiter, a Federal court judge,"* thus avoiding the "procedural advantages enjoyed by the franchisor" in the state courts.

Representative Brown went on to reiterate the unifying purpose of the PMPA:

> "The bill has two basic purposes. First, it protects the franchisee . . . Second, *the bill provides uniformity of rules* under which such franchises are to be operated and termination and nonrenewal may occur. *Some 30 States have conflicting petroleum*

> *marketing protection laws which make it difficult for companies to develop unified and efficient national and regional marketing plans.*
>
> This is one of the problems this legislation is designed to cure, since *it preempts such laws and the various differences in them.*
>
> Today, the petroleum industry markets motor fuel through a unique and extremely *complex marketing system which often transcends State lines.*" 95th Cong. 1st Sess., Congressional Record — House, Vol. 123, Part 9, p. 10384 (1978). (Emphasis added.)

Once again, Congressional intent is stated by Representative Whalen:

> "The legislation before us today *provides a single, uniform set of rules regarding the grounds for termination and nonrenewal of motor fuel marketing franchises . . .*
>
> Last, the legislation places upon the franchisor the burden of proving compliance with all statutory requirements and *provides for enforcement by private civil action in U.S. District Court.*" 95th Cong., 1st Sess., Congressional Record – House, Vol. 123, Part 9, p. 10387 (1978). (Emphasis added.)

The legislative history of the PMPA establishes the "unmistakable implication" of Congressional intent

which overrides the presumption of concurrent jurisdiction.

IV. There is a Clear Incompatibility Between State Court Jurisdiction and Congress' Stated Intent to Provide A Uniformity of Laws Governing Petroleum Marketing.

Senator Jackson, speaking in support of the PMPA, stated:

> "As one would expect, the gasoline dealers across the country support Title I. And just as important, most of the oil companies also support Title I. One might ask why the oil companies would willingly accept a restraint on their contractual powers? The answer is simple — State legislatures, reacting to the pleas of disenfranchised dealers, enacted State dealer protection laws. *The patchwork of these State laws has become a serious encumbrance on the franchisor-gasoline suppliers, so much so that they are willing to accept the restrictions of Title I in return for uniformity of laws across the nation.*" 95th Cong., 2d Sess., Congressional Record — Senate, Vol. 124, Part 10, p. 12764 (1978). (Emphasis added.)

The *Tafflin* Court found that concurrent jurisdiction over RICO would create no incompatibility with federal interests because: (1) state court holdings on federal

criminal law would have no precedential value, the courts only construing federal criminal law for the purpose of deciding whether or not a "predicate act" existed in a civil action for violation of RICO, a decision which would have no impact or effect on substantive federal criminal law (107 L.Ed.2d at 898) and; (2) nearly three-quarters of RICO cases involve "predicate acts" that are questions of state law — over which state courts have greater expertise.[3]

The situation with regard to the PMPA is, however, directly opposite. One of the express purposes of the PMPA was to create one single uniform set of rules to be applied to franchise relationships. To insure that this purpose would be served, Congress took the extraordinary step of explicitly preempting all differing state laws:

> "To the extent that any provision of this title applies to the termination . . . of any franchise, or to the nonrenewal . . . of any franchise relationship, *no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation* (including any remedy or penalty applicable to any violation thereof) with respect to termination . . . of any such franchise or to the nonrenewal . . . of any such franchise relationship *unless such*

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[3] The *Tafflin* Court quotes a report which found that 54.9% of all RICO cases involved common law fraud and another 18% involved either "non-securities" fraud or "theft or conversion." (107 L.Ed.2d at 899). Thus, 72.9% of RICO cases require a court to interpret state law.

> *provision of such law or regulation is the same as the applicable provision of this title.*" 15 U.S.C. §2806(a). (Emphasis added.)

It would defeat the purpose of, and be counter-productive to, this specific preemption provision to allow states to separately develop individual bodies of decisional law.

The PMPA has given rise to an extensive amount of litigation interpreting its various provisions. It would destroy one of the essential purposes of the PMPA, and frustrate Congress' express intentions, to allow each state to apply its own policies, standards and interpretations to the PMPA. A franchisor could very easily be faced with being forced to develop a different marketing policy in each state to comply with each state's particular interpretation of the provisions of the PMPA.

The *Tafflin* Court found that concurrent jurisdiction over RICO claims would produce only a "negligible effect on the uniform interpretation and application of federal criminal law" because "state court judgments misinterpreting federal criminal law would, of course, be subject to direct review by this court." 107 L.Ed.2d at 898.

However, state court judgments interpreting federal *civil* law are only reviewable by the United States Supreme Court on a grant of certiorari and even then only after the highest state court has made its ruling. 28 U.S.C. §1257. Thus, as a practical matter, the effect of an erroneous state court ruling on the PMPA will be significantly more burdensome for litigants and produce much more than the "negligible effect" on uniformity that the *Tafflin* Court predicted for concurrent jurisdiction of RICO claims.

V. The Explicit Terms of the PMPA Strongly Suggest Congress' Intent to Limit Jurisdiction to Federal Courts.

With respect to RICO, the *Tafflin* Court found in the express terms of the statute only a permissive grant of federal jurisdiction:

> "Any person injured ... may sue therefor in any appropriate United States district court ...." 107 L.Ed.2d at 895, citing 18 U.S.C. §1964(c).

The PMPA, however, provides a much more specific grant of jurisdiction:

> "Such action may be brought, *without regard to the amount in controversy,* in the district court of the United States in any district in which the principal place of business of such franchisor is located or in which such franchisee is doing business ...." 15 U.S.C. §2805(a). (Emphasis added.)[4]

Congress' specific reference to the "amount in controversy" requirement is significant because the requirement was unique to federal courts and its waiver makes the federal courts available to the entire range of PMPA actions, thus eliminating any need for state court jurisdiction.

The PMPA explicitly incorporates the Federal Rules, governing not venue and service of process, as does

---

[4] The PMPA was enacted prior to the elimination of the amount in controversy requirement in federal question jurisdiction.

RICO (107 L.Ed.2d at 899), but the more substantial matter of the manner in which relief may be fashioned:

> "If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled —
>
> (A) *consistent with the Federal Rules of Civil Procedure,* to actual damages;" 15 U.S.C. §2805 (d)(1)(A). (Emphasis added.)

In addition, §2805(b)(2) of the PMPA utilizes the standards set forth in Fed.R.Civ.P. 65 for the issuance of preliminary and temporary equitable relief. Discussing this injunctive relief provision, the Senate Report makes unmistakably clear that federal standards govern:

> "In utilizing this standard [referring to 15 U.S.C.§2805] for the grant of preliminary injunctive relief, the committee has embraced a judicial standard utilized by the Second Circuit." Sen. Rep. No. 95-731, 95th Cong., 2d Sess. at 41, *as reprinted in*, 1978 U.S. Code Cong. & Admin. News at 899.

The *Tafflin* Court noted that ". . . congressional specification of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction . . . ." 107 L.Ed.2d at 899. Although the Court went on, in light of its entire analysis of RICO's legislative history, to state that such specification "does not by itself suffice to create a 'clear incompatibility' with federal interests" (107 L.Ed.2d at 899), the more meaningful federal procedural rules incorporated into the PMPA are consistent with Congress'

unmistakable intention that PMPA actions be heard by an "impartial arbiter, a Federal court judge."

There is little doubt that, as opposed to the absence of Congressional consideration of exclusive jurisdiction over RICO claims, emphasized by the *Tafflin* Court, Congress intended, indeed had no other thought but that the PMPA would be governed by federal rules and enforced solely in federal courts.

CONCLUSION

This petition should be granted so that this Court may put an end to the confusion and uncertainty currently existing among the states with respect to an issue affecting a vital segment of the nation's economy. Petitioner Union Oil Company of California respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

BESSER & CHAPIN

ROBERT S. BESSER
Counsel of Record

CHRISTOPHER CHAPIN

Attorneys for Petitioner

APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL — SECOND DIST.
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Deputy Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff, Cross-
Defendant and Appellant,
v.
PATRICK M. O'RILEY,
Defendant, Cross-
Complainant and Respondent.

No. B028866
(Super.Ct.No. SWC 64570)

APPEAL from a judgment of the Superior Court of Los Angeles County, William R. Hollingsworth, Judge. Affirmed.

Besser & Chapin, Robert S. Besser and Christopher Chapin for Plaintiff, Cross-Defendant and Appellant.

Neil E. Campbell, Jr., for Defendant, Cross-Complainant and Respondent.

On October 24, 1989, we dismissed this appeal, finding that the federal courts exercise exclusive jurisdiction over cases based upon violations of the

Petroleum Marketing Practices Act (PMPA), 15 United States Code section 2801, et seq. Defendant/Cross-Complainant/respondent Patrick M. O'Riley successfully petitioned the United States Supreme Court for Writ of Certiorari. The United States Supreme Court vacated our earlier judgment and remanded the cause to us for further consideration in light of *Tafflin v. Levitt* (1990) 493 U.S. ___; 107 L.Ed.2d 887. Upon reconsideration, we conclude that our earlier opinion, relying primarily on *Rustom v. Atlantic Richfield Co.* (D.C.Cal. 1985) 618 F.Supp. 210, was in error and that the state courts do enjoy concurrent jurisdiction with the federal courts over cases based upon the PMPA. We first address our reasons for reaching this conclusion, and then the merits of the underlying appeal.

DISCUSSION

In *Tafflin v. Levitt,* the United States Supreme Court addressed the issue of whether state courts have concurrent jurisdiction with federal courts over suits brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO).

The court began its discussion with a reminder that state courts have inherent authority and are presumptively competent to adjudicate claims arising under laws of the United States, and that exclusive jurisdiction must be expressed or implied. (*Id.*, at p. 894.) "This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." (*Ibid.*) In addition to rebuttal by explicit congressional action, the presumption may be rebutted by unmistakable implication from legislative history, or clear incompatibility between state court jurisdiction and federal interests. (*Ibid.*)

The court found that there was no explicit congressional action establishing exclusive federal jurisdiction over RICO claims. (*Id.*, at p. 893.) As to the legislative history, the court held that there was no evidence that Congress even considered the question of concurrent jurisdiction, defining the test as "whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal." (*Id.*, at p. 896.) As to the concern about incompatibility with federal interests, the court noted the three factors indicating clear incompatibility (desirability of uniform interpretation, the expertise of federal judges in the federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims) were not at issue in *Tafflin*. The court found that federal courts would retain full authority and responsibility for interpretation and application of federal criminal laws as they would not be bound by state court interpretations of federal offenses; state court judgments misinterpreting federal criminal law would be subject to direct review by the Supreme Court; and, in any event, any inconsistency arising from state court interpretations would be no more than that arising from the "multi-membered, multitiered federal judicial system." Moreover, the court concluded, it had full faith in the ability of state courts to handle the complexities of RICO, particularly since many RICO cases involved asserted violations of state laws. (*Id.*, at pp. 897-898.)

The *Tafflin* plaintiffs had argued that the RICO statute was incompatible because it required conformance with extended venue and service-of-process provisions that are applicable only in federal courts. The court rejected this assertion, concluding that it had previously found concurrent jurisdiction in such situations and, standing alone, these procedural requirements did not indicate clear incompatibility of federal interests. (*Id.*, at p. 899.)

We are here concerned if the analysis of *Tafflin* compels us to reverse our earlier holding that the federal courts exercise exclusive jurisdiction over matters arising pursuant to the PMPA. As noted, we find that *Tafflin* does compel that reversal.

Plaintiff/cross-defendant/appellant Union Oil Company of California (Union Oil) concedes that there is no explicit grant of exclusive federal court jurisdiction in the PMPA.[1] Union Oil argues, however, that, unlike *Tafflin*, the legislative history of PMPA does offer clear evidence that the Congress intended the federal courts to exercise exclusive jurisdiction. It argues that the nature and purpose of the PMPA establish the clear incompatibility between state court jurisdiction and federal interests.

To support these assertions, Union Oil points to comments made by congressional representatives, regarding the PMPA requirement that the franchisor prove to an "impartial arbiter, a Federal court judge" that termination or nonrenewal of a franchise was proper, and that the legislation provides for "enforcement by private civil action in U.S. District Court" (95th Cong. 1st Sess., Congressional Record — House, vol. 123, Part 9, p. 10384, p. 10387). Union Oil quotes several passages from the Congressional Record where the need for uniformity of rules throughout the States is underscored as a reason for passage of the PMPA. It notes that the PMPA explicitly preempts all conflicting state laws and

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[1] In pertinent part, section 2805, subdivision (a), of the PMPA provides: "If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business."

points out that the PMPA specifically incorporates the Federal Rules governing not venue and service of process, like *Tafflin*, but the manner in which relief may be fashioned and utilizes the standards set forth in rule 65 of the Federal Rules of Civil Procedure for issuance of preliminary and temporary equitable relief.

This is precisely the analysis done by Judge Tashima in *Rustom v. Atlantic Richfield, supra*, the decision upon which we previously relied. In vacating our earlier judgment, it appears the United States Supreme Court is not of the same mind. *Tafflin's* reasoning makes clear that the presumption in favor of concurrent jurisdiction is not to be lightly discarded. Random comments made during presentation of the legislation which do not directly discuss whether the legislation "ousts the state courts of jurisdiction" are insufficient. (*Tafflin v. Levitt, supra*, 107 L.Ed.2d at pp. 894; 895-896.) Desire for uniformity of enforcement does not necessitate a finding that Congress meant only federal courts to rule on PMPA matters. (*Id.*, at p. 898.) Conformance with federal rules of procedure does not create a "clear incompatibility" with federal interests. (*Id.*, at p. 899.) Consequently, we find that state courts have concurrent jurisdiction with federal courts over claims made pursuant to the PMPA.[2]

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[2] We are aware that this conclusion is at odds with the holding of *Niakan v. Samaan* (1988) 199 Cal.App.3d 716. We note, however, that *Niakan* relied solely on *Rustom v. Atlantic Richfield, supra*, and was decided well before *Tafflin v. Levitt, supra*.

THE UNDERLYING APPEAL

INTRODUCTION

Union Oil sued respondent Patrick M. O'Riley (respondent) for sums due for gasoline and diesel delivered to respondent's station and resold by him. Respondent cross-complained, asserting Union Oil violated the notice requirements of the PMPA, breached their contract, and made promises it did not intend to keep. After a jury trial, the jury returned a verdict in favor of Union Oil on its complaint in the amount of $15,869.68, and in favor of Union on the contract and fraud claims of respondent. The jury found for respondent on his PMPA claim and awarded him $162,000. The court awarded respondent $40,000 in attorney fees, $40,500 in punitive damages, and $2,625 expert witness fees. Union Oil appeals.

FACTS

As there is some dispute about the sufficiency of the evidence presented, we set forth the facts as related in pertinent testimony.

Respondent's Testimony:

On June 22, 1981, respondent entered into a franchise lease with Union Oil, wherein he agreed to operate the Union Oil station located on the corner of Figueroa Street and Pacific Coast Highway in the city of Wilmington.

There were three tanks at the station: one 10,000 gallon leaded premium tank, one 10,000 gallon unleaded regular tank, and one 5,000 gallon diesel tank. To arrange delivery of needed fuel, respondent would call the Union Oil terminal 48 hours prior to the desired

delivery date and order the necessary amounts. He would then prepare the payment for the previous load and place it in the lock-box. Only Union Oil fuel delivery personnel had keys to the lock box. The normal delivery procedure was as follows: the Union Oil fuel delivery truck driver would drive to the back of the station, retrieve payment for the previous load from the lock-box, then deliver the new load. Prior to December 6, 1981, Union Oil never delivered a load of gasoline which respondent had not ordered 48 hours before. Neither was there ever a time when respondent had to pay for a current load of gasoline before it would be delivered. As the Union Oil representatives explained to respondent, the only requirement for delivery of a fresh load of fuel was payment for the previous load before delivery of the fresh load.

When respondent began his franchise, the station was operated as a full service station. In addition to the fuel, the station had two service bays with a fully qualified mechanic on duty and offered tires, batteries and accessories for sale. Andre F. Van der Valk, the Union Oil area manager in charge of the service stations in respondent's area, met with him often and suggested that the station become a self-serve station. Respondent, however, had no intention of becoming self-service and told Mr. Van der Valk so. Though Mr. Van der Valk offered incentives, respondent was reluctant to convert the station because he would be required to close the service bays and reduce his retail sales. Mr. Van der Valk offered to pay respondent the value of the station retail inventory. In exchange he wanted respondent to convert the station within 30 days, install 14 automated pumps, increase the diesel capacity to 10,000 gallons, and reduce the lease costs by 75 percent. Respondent was still hesitant.

Thereafter, in June 1981, respondent placed an order for delivery of gasoline, and it was not delivered. When he inquired as to the reason, he was informed that a credit hold had been placed on his order and that he would have to speak to Mr. Van der Valk. Respondent was surprised because he had not written any bad checks and had never failed to pay for a previous load. A couple of days before, respondent had spoken to Mr. Van der Valk, who again had broached the self-serve idea. When respondent asked if he could close the station between the hours of midnight and 6:00 a.m., Van der Valk commented, "Well, if you're not gonna [*sic*] consider going self-serve, why should I consider do [*sic*] anything to you." Respondent was unable to contact Mr. Van der Valk about the credit hold and finally spoke to Bill Thomas, the Union Oil retail representative. Mr. Thomas assured him there was no "hold" on his fuel load. Mr. Thomas attempted to reach Mr. Van der Valk but later informed respondent that Mr. Van der Valk was on vacation, and the terminal would not release respondent's order without Mr. Van der Valk's authorization. Mr. Thomas unsuccessfully attempted to have another manager lift the "hold" but was told that only Mr. Van der Valk could do so. By that time respondent had run out of fuel and had been forced to close the station. When Mr. Van der Valk returned, he lifted the hold and apologized, explaining that it had been a mistake.

Forty-eight hours before the 4th of July, respondent placed an order for gas because he was going to be out of town for the holiday and wanted the gas delivered before he left. He prepared the payment for the previous load, but the load was not delivered during the three-day holiday weekend. When later seeking an explanation from Mr. Van der Valk, he was told the load had been mistakenly delivered to another station, which had not

ordered gas. Respondent found this explanation to be unbelievable because he knew a load would not be delivered without payment in the lock-box for a previous load. Just prior to the 4th of July, respondent had had another discussion with Mr. Van der Valk, wherein Mr. Van der Valk had again recommended that respondent's station become self-serve. When respondent again declined, Mr. Van der Valk was unhappy. Also, Mr. Van der Valk had been upset earlier because respondent had purchased a tire changer from a manufacturer other than Union Oil. This purchase was permissible under respondent's contract.

Shortly thereafter, respondent was informed that he might require back surgery. Consequently, he began to rethink his position on converting to self-serve. In September 1981, respondent agreed to convert the station to self-serve. Mr. Van der Valk told him that when he stopped servicing cars and selling tires and other accessories, his rent would be reduced by $500 per month. Van der Valk said that within 30 days Union Oil would install all automated pumps, increase the fuel capacity, install a freeway sign and other self-serve signs around the stations. He also said that Union Oil would give respondent credit for or purchase his inventory. The two men shook hands on the deal.

Thereafter, respondent ceased selling tires and other accessories and closed his mechanical bays. Union Oil lowered his rent but did nothing else. Though respondent inquired on a daily basis about the work Union Oil had agreed to do, Union Oil never fulfilled its promises. Respondent was very concerned, especially about installation of the automated pumps since he had to continue hiring employees to monitor the amount of gas the customers were pumping. Consequently, respondent could not lower his prices. When Mr. Van der Valk told

respondent to lower his prices if he wanted the other work done, he complied.

By November 1981, respondent concluded that Union Oil was not going to live up to its end of the bargain. He had a heated discussion with Mr. Van der Valk, informed him that he would place his franchise up for sale, and repeated that he would seek legal advice. Mr. Van der Valk called respondent a "troublemaker" and warned that he could find any excuse to terminate respondent's lease. Shortly thereafter, Mr. Thomas told respondent that Mr. Van der Valk was going to terminate his lease because respondent was causing too many problems.

From November 30 to December 1, 1981, and from December 10 to December 15, 1981, respondent was hospitalized. Before entering the hospital on November 30, respondent had ordered a load of gasoline, which was delivered but for which respondent had not paid. While in the hospital from December 10 to 15, he received several calls from Union Oil demanding payment for a load that Union Oil said had been delivered between the 1st and 6th of December. Respondent asked who ordered the gas and why it was delivered without payment to the previous load. Union Oil responded that the delivery was related to a tank test it performed. Union Oil claimed respondent owed between $24,000 and $34,000. No one from Union Oil had given respondent notice about performing any tank test.

In the meantime, the station was running low on gas; therefore, respondent attempted to place an order for diesel fuel. Union Oil refused to deliver until he paid for the gas which had been delivered.

Respondent left the hospital on December 15 and stayed in bed until December 20. On December 20, his wife brought him some mail, including a notice of default under the station lease which requested a $1648.09 payment due on December 1; a second notice

of default which requested a $10,609.10 payment due on December 6; and a third notice of default which stated his lease would be terminated by December 21, 1981, and requested a $24,095.42 payment. The third notice was dated December 16, 1981. None of these notices was personally delivered to him by Union nor sent via certified mail. All of the notices had been sent to the service station. Respondent immediately called Mr. Van der Valk, who informed him that Union Oil was going to take the station the next day at 1 p.m.

Before December 20, respondent claims he had no idea Union Oil wanted $25,000 from him. On December 21, respondent went to see his attorney. Respondent telephoned Mr. Van der Valk from his attorney's office, asked for an explanation, and warned that if Union Oil persisted a suit would be filed. Mr. Van der Valk reiterated that the station would be seized.

Testimony of Andre F. Van der Valk:

At the times relevant to this appeal, Mr. Van der Valk was the Union Oil area manager in charge of the service stations in the geographic area that included respondent's station.

Mr. Van der Valk did not place a credit hold on respondent in June 1981, or at any other time, and never interfered with a gas delivery to respondent's station.

Respondent arranged to meet with him and initiated discussions about the station conversion to self-serve. Mr. Van der Valk explained to respondent that he did not have the authority to authorize complete conversion of a station to self-serve, and that normally a test period of six to eight months was necessary. Except for this one meeting, respondent and Mr. Van der Valk had no further discussions about a self-serve conversion until respondent contacted Mr. Thomas and indicated he had converted his station, and asked what Union Oil was

going to do to assist him. This action took Mr. Van der Valk by surprise. After talking with Mr. Thomas, and seeking the necessary authorization, Mr. Van der Valk agreed to reduce respondent's rent by 75 percent and to provide him with signs. The rent was reduced and the signs were provided. At no time did Mr. Van der Valk attempt to force respondent to convert the station to self-serve. He made no false promises to him and did not interfere with his ability to run his business.

The delivery procedure was as described by respondent, that is, the delivery truck would pick up payment for the previous load from the lock-box before delivering the current load of gasoline.

Union Oil delivery receipt records indicate that on December 1, 1981, a load of approximately 8700 gallons was delivered at 4:30 a.m. to respondent's station; that on December 6, 1981, approximately 8600 gallons of gasoline was delivered at 10:25 p.m.; that earlier that day approximately 9600 gallons had been delivered at 1:10 p.m.; and that on December 7, approximately 2061 gallons were delivered in the morning. Each delivery consisted of only unleaded and super gasoline. The loads delivered on the 6th and 7th were delivered because Union Oil was conducting routine testing of the tanks and lines for any leaks or holes. Respondent's station was the last to be tested in the area.[3] When Union Oil performs a tank test the "lock-box" payment is not utilized because the primary consideration is performance of the test. Normally, the station dealer and the credit department arrange for the tank test. As Mr. Van der Valk was on vacation when the tank test was performed at respondent's station, he was unaware

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[3] The owner of the tank testing company testified that the tests on the gasoline tanks were performed on December 7, 1981, and the tanks were found to have leaks.

whether such an arrangement had occurred between the credit department and respondent before the tank test was done. However, in the case of respondent's station, it was a mistake to deliver the load without there being payment in the lock-box for the previous delivery. A subsequent letter received from Union Oil's credit supervisor in Illinois requested an explanation of why the test load was delivered without prior payment for the previous load. It appears that the Los Angeles gas terminal had misunderstood the verbal credit release from Illinois and had stamped the route slips "okay to deliver" before sending the dispatcher.

Mr. Van der Valk had authority to give notice of termination of station contracts. He is aware of the notice requirements of the PMPA, and when giving these notices he attempts to comply. On December 16, 1981, Mr. Van der Valk signed the default notice, requesting payment of almost $24,000 from respondent. The sole reason for the termination of respondent's contract was the amount Union Oil believed he owed for the delivered gasoline. The notice was served at the station, but Mr. Van der Valk did not know whether it was personally served on respondent. The receipt was not signed by respondent. The notice was not posted by certified mail.

Mr. Van der Valk was aware that respondent was experiencing economic difficulties at the station. Mr. Van der Valk did not discuss the situation with respondent. He went to the station on December 21st and collected the keys to the station from the manager. Mr. Van der Valk did not know that respondent had been in the hospital and did not recall respondent ever telephoning him to ask for an explanation.

Testimony of William Thomas:

During the times pertinent to this appeal, Mr. Thomas was a retail representative for Unocal Corporation. He

was assigned the area which included respondent's service station. A retail representative functions as a landlord for Union Oil and normally makes calls on area stations every two weeks.

Respondent was the first to broach the subject of his station converting to self-serve. Mr. Thomas attended the meeting which occurred between respondent and Mr. Van der Valk to discuss the possibility of respondent's station becoming self-serve. He recalled that it was decided that respondent's station would be tested, a rent waiver would be issued, and if the test went well, Union Oil would offer a self-serve lease. Mr. Thomas had no advance notice that respondent was going to convert to self-serve and was surprised when he learned respondent had done so.

In the first part of December 1981, Mr. Thomas became aware that a tank test was to be performed at respondent's station. He called respondent and informed him that Union Oil would have to fill the tanks with gasoline. Respondent was concerned that he would have to pay for all the gasoline at that time, but Mr. Thomas assured him that he could pay for the gasoline as he sold it. After the tank test was completed, Mr. Thomas spoke to respondent and instructed him to call once he had sold enough gasoline to pay for a load, and Mr. Thomas would pick up the payment and record it accordingly. Mr. Thomas never received such a call from respondent, and respondent never offered to pay for any of the "test" gasoline.

Mr. Thomas prepared the December 16, 1981, default notice. He personally delivered it to respondent's service station on the 16th. Respondent was not at the station on that day, so he delivered the default to a Mr. Nelson, an employee at the station.

PROCEDURAL HISTORY

On September 13, 1982, Union Oil filed a complaint against respondent, alleging he owed it $23,466.41 with interest. Respondent cross-complained against Union Oil, alleging that Union Oil violated the provision of the federal PMPA when it terminated his franchise, that Union Oil breached certain of its contractual obligations to respondent, and Union Oil make promises to respondent it did not intend to keep.

After a jury trial, the jury returned a special verdict in favor of Union Oil on its complaint in the amount of $15,869.68;[4] against respondent on his causes of action for breach of contract and fraud; and in favor of respondent on his PMPA claims.

The court awarded respondent attorney fees in the amount of $40,000, punitive damages in the amount of

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[4] In pertinent part, the special verdict provided: "Did Union Oil give Patrick O'Riley 90 days' notice of termination? [¶] ANSWER: NO.... [¶] Did Union Oil personally deliver notice of his franchise to Patrick O'Riley? [¶] ANSWER: No.... [¶] Is Union Oil excused from personally delivering the notice of termination to Patrick O'Riley because he was not prejudiced by lack of personal delivery? [¶] ANSWER: No.... [¶] Did Union Oil base its intention to terminate Patrick O'Riley's franchise on a reason for termination permitted by the Petroleum Marketing Practices Act? [¶] ANSWER: Yes.... [¶] Did Union Oil adequately set forth in the notice of termination its reasons for termination of Patrick O'Riley's franchise? [¶] ANSWER: Yes.... [¶] Did Union Oil deliberately create Patrick O'Riley's indebtedness in order to terminate his franchise? [¶] ANSWER: Yes.... [¶] Did the violation of the Petroleum Marketing Practices Act by Union Oil cause damage to Patrick O'Riley? [¶] ANSWER: Yes.... [¶] What is the total amount of damage suffered by Patrick O'Riley as a result of the violation of the Petroleum Marketing Practices Act? [¶] ANSWER: $162,000."

$40,500,[5] and expert witness fees in the amount of $2,625.

On May 27, 1987, judgment was entered.

On June 10, 1987, Union Oil moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. It asserted that the court was without subject matter jurisdiction and that the evidence was insufficient to support the jury's verdict. The motions were denied and a timely notice of appeal was filed.

DISCUSSION

On appeal, Union Oil reiterates the contentions raised below. Having already addressed the subject matter jurisdiction argument, we now discuss Union Oil's other assertions that substantial evidence is lacking to support either the verdict on the PMPA claims or the punitive damages award. Both contentions are without merit.

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[5] Pursuant to the PMPA section 2805, subdivision (d)(2), the court and not the jury makes the award of punitive damages.

After reciting the jury's findings, the court's minute order offers the following rationale for the award of punitive damages: "This finding amounts to a determination by the jury that Union Oil acted in willful disregard of the requirements of Section 2802 and 2803 of the Act, and the rights of the franchisee, O'Riley, thereunder. [¶] The Court finds that defendant has net worth in the millions. That 24% of the damages assessed by the jury would adequately deter defendant from similar conduct in the future and would not be out of proportion to defendant's wealth. That plaintiff is entitled to reasonable attorneys fees; that plaintiff's requested attorneys fees of $53,800 was reasonable and necessary and that $40,000.00 of said sum represents fees incurred in connection with Count III which the jury found for plaintiff and against defendant. That $2625.00 was incurred by plaintiff for expert witness fees and said sum is fair and reasonable. That plaintiff is entitled to an award of attorneys fees and costs pursuant to P.M.P.A. Act [*sic*]."

The PMPA Claim. "It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) With this rule in mind, we look to the issues before us.

1. Creation of indebtedness. By special verdict the jury found that respondent did owe Union Oil $15,869.68 for the gas which had been delivered to effectuate the tank tests and further found that Union Oil had deliberately created this indebtedness and used it as the basis for its decision to terminate the franchise. Union Oil asserts that there is no evidence to support this finding.

Union Oil argues that respondent had two choices once the gas was delivered. He could either refuse to accept the unordered gasoline or sell the gas to the public. Having sold the gasoline, respondent thereby accepted it. Within the meaning of California Commercial Code section 2606,[6] respondent thus chose to become indebted to it, according to Union Oil.

No one questions that respondent owed Union Oil for the gasoline, and the jury so found. The heart of Union Oil's argument is its denial that it deliberately created the indebtedness so it could have a basis for terminating respondent's franchise agreement. The problem with

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[6] In pertinent part, California Commercial Code section 2606 provides: "(1) Acceptance of goods occurs when the buyer . . . [¶] (c) Does any act inconsistent with the seller's ownership."

this argument is that Union Oil is asking us to reweigh the evidence. That, simply is not our role. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) To have reached this conclusion, the jury perforce believed the testimony of respondent regarding the various disagreeable incidents which had occurred between respondent and Union Oil. On the basis of the evidence, summarized *supra,* the jury concluded that Union Oil wanted to terminate respondent's franchise because he was a "troublemaker." According to respondent's testimony, he had had several unpleasant discussions with Mr. Van Der Valk and, at one point, was warned by Mr. Thomas that Mr. Van Der Valk was going to terminate his lease. The fact that Union Oil arranged for the testing of the tanks and the related delivery of the unordered gasoline when respondent was hospitalized was accepted by the jury as further evidence that Union Oil was not treating respondent O'Riley in an above board manner. We cannot say that the jury erred in coming to the conclusion that Union Oil "deliberately created" this indebtedness. Substantial evidence exists to support this finding.

2. Compliance with the PMPA notice requirements. In its special verdict the jury found that Union Oil had not given respondent 90 days notice, had not personally delivered notice to respondent and was not excused from personal delivery of the notice to respondent. The jury did find Union Oil had based its intention to terminate respondent's franchise on a reason permitted by the PMPA; and adequately had set forth its reason for termination in the notice. Union Oil asserts that there is no substantial evidence that it failed to comply with the notice requirements of the PMPA and argues that, in fact, it substantially complied with these requirements.[7]

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[7] In pertinent part, section 2804 of the PMPA provides: "(a) Prior to termination of any franchise . . ., the franchisor shall furnish

(continued)

In so urging, Union Oil focuses on the adequacy of the statement of reasons included in the notice. No one argues that the statement of reasons was inadequate; in fact, the jury specifically found that the notice contained an adequate explanation of Union Oil's reasons for termination. The jury found Union Oil violated the PMPA when it gave respondent, at the most, five days notice of its intention to terminate the franchise and, without excuse, failed to personally serve respondent with the notice. We need not reiterate the uncontradicted evidence, summarized *supra,* that clearly supports these findings.

In its Reply Brief, Union Oil asserts that the shortened notice of the instant case was reasonable under the circumstances and cites cases which hold that a "reasonable" standard applies. Union Oil admits that the trier of fact was not asked to determine whether five days notice, and one day actual notice, was reasonable under the circumstances and blames this on a "drafting error." Union Oil, in effect, asks us to determine that the shortened notice was reasonable. We decline to do

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(ftn. continued)
notification of such termination . . . to the franchisee who is a party to such franchise. . . . [¶] (1) in the manner described in subsection (c) of this section; and [¶] (2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect. [¶] (b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination . . . takes effect, . . . [¶] (A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing such notification is reasonably practicable; . . . [¶] (c) Notification under this section — [¶] (1) shall be in writing; [¶] (2) shall be posted by certified mail or personally delivered to the franchisee; and [¶] (3) shall contain — [¶] (A) a statement of intention to terminate the franchise . . . together with the reasons therefor; [¶] (B) the date on which such termination . . . takes effect; and [¶] (C) the summary statement."

so because this is purely a question of fact. Moreover, Union Oil offers no explanation of how the "drafting error" occurred nor does it argue that the "drafting error" is grounds for reversal. In any event, as the jury found that Union Oil was not excused from personally delivering the notice of termination to respondent, a permitted inference is that had it been asked whether five days notice was reasonable, the jury would have responded negatively.

The Punitive Damage Award. Union Oil objects to the $40,500 punitive damages award, asserting that there is no substantial evidence to support the jury's finding that it deliberately created the indebtedness upon which it based its termination of respondent's franchise or that it willfully disregarded the requirements of the PMPA; consequently, the court's reliance on these findings is reversible error.

As we have concluded above that substantial evidence does exist to support the jury's finding regarding creation of the indebtedness, we need not repeat the exercise here. As to Union Oil's assertion that substantial evidence is lacking to support a finding that it willfully disregarded the requirements of the PMPA, it too is unavailing. Union Oil ignored the 90 day notice requirement. Its notice includes preprinted language, stating that Union Oil views as "unreasonable" the giving of 90 days notice whenever a franchisee is indebted to it. This language is evidence that Union Oil willfully ignored the PMPA's requirements whenever a franchisee owed it money. In addition, there was evidence that Union Oil representatives repeatedly threatened respondent with termination of his franchise because of unhappiness with his complaints. Respondent testified that Mr. Van Der Valk threatened to terminate his franchise based on "any excuse." Mr. Thomas told respondent that Mr. Van der Valk was going to terminate the franchise because

respondent was "causing too many problems." Thus, the court and the jury found that the termination of respondent's franchise was in retaliation for respondent's complaints. This type of retaliatory termination is exactly the sort of conduct which Congress enacted the PMPA to prevent. (*Gilderhus v. Amoco Oil Co.* (1979 2nd. Dist.) 470 F.Supp. 1302, 1305.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

GOERTZEN, J.

We concur:

WOODS (Arleigh), P.J.

GEORGE, J.

APPENDIX B

Second Appellate District, Division Four, No. B028866
S013098

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAR 13 1991
Robert Wandruff, Clerk
Deputy

UNION OIL COMPANY OF CALIFORNIA, Appellant
v.
PATRICK M. O'RILEY Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C

TITLE 15. COMMERCE AND TRADE
CHAPTER 55 — PETROLEUM MARKETING PRACTICES
SUBCHAPTER I — FRANCHISE PROTECTION

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to compy with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of —

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to compy with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if —

(A) the franchisee shows —

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced —

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90

days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled —

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchise thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under section (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that —

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business —

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions

to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

§ 2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by an applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Supreme Court, U.S.
FILED
JUL 8 1991
OFFICE OF THE CLERK

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No. 90-1892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,
vs.
PATRICK M. O'RILEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NEIL E. CAMPBELL, JR.
Counsel of Record

NEIL E. CAMPBELL, JR.
A Professional Law Corporation

2271 Torrance Boulevard
Torrance, California 90501
(213) 533-6125

Attorney for Respondent
PATRICK M. O'RILEY

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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QUESTION PRESENTED

Need this court again review a California intermediate appellate decision which merely follows the mandate of this court in Tafflin v. Levitt, 493 U.S. ____, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) in holding that state courts may exercise concurrent jurisdiction over claims made under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, et seq.?

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STATEMENT OF THE CASE

The decision of the Court of Appeal sets forth fully and accurately the history of this case. However, a brief synopsis suffices:

After a three-week jury trial in Los Angeles Superior Court, defendant O'Riley, who, pursuant to contract, operated a gasoline station franchise, was given a judgment against Union Oil Company of California ("Union"), O'Riley's franchisor, on his cross-complaint for breach of the notice and termination provisions of the PMPA.

Only after the trial judge concurred in the jury's determination that Union's breach of the PMPA was willful and deliberate and awarded punitive damages, plus costs and attorneys' fees, did Union

first claim that the state court lacked jurisdiction over PMPA claims.

Union appealed, raising the jurisdictional issue. While the appeal was pending, Union raised the same issue in another appeal, without informing counsel, so that the issue could be joined by all interested parties, and procured the decision in Niakan v. Samaan, 199 Cal.App.3d 716, cert. denied, 103 L.Ed.2d 572 (1988). Niakan followed the U.S. District Court case of Rustom v. Atlantic Richfield Co., 618 F.Supp. 210 (C.D. Cal. 1985) in holding that jurisdiction over PMPA claims is exclusively federal. As could be expected, the Court of Appeal in this case, initially simply followed its earlier ruling in Niakan.

After review was denied by the California Supreme Court, O'Riley then petitioned this court, which granted certiorari, reversed the Court of Appeal decision below, awarded O'Riley costs and ordered that the Court of Appeal reconsider its decision in light of Tafflin v. Levitt, 493 U.S. _____, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), which held that the states have concurrent jurisdiction over RICO private actions, and discusses extensively the presumption in favor of concurrent jurisdiction and the reasons which support the presumption.

Following the order of this court, on remand, the Court of Appeal reconsidered and decided that Tafflin mandates concurrent state and federal jurisdiction over

PMPA claims.

Now, following denial of review by the California Supreme Court, Union asks this court to again review this case.

REASONS FOR DENYING THE WRIT

I. While A Conflict in Decisions Exists, Such Conflict Is Not Ripe For Disposition By This Court, As This Court's Guidance In Tafflin v. Levitt Has Not Yet Been Considered By The Lower Courts.

Union suggests that because a conflict exists between the state courts of last resort in Pennsylvania (Johnson v. Mobil Oil Corporation (1989) 560 A.2d 124) and Maine, C.N. Brown Co. v. Gillen, (1990) 569 A.2d 1206, this court should resolve that conflict by granting its petition for certiorari.

This argument is disingenuous because it overlooks the obvious. Clearly this court intended its decision in Tafflin v. Levitt, supra, 493 U.S. _____, 110 S.Ct.

792, 107 L.Ed.2d 887 (1990), to provide guidance to both state and federal courts on the question of concurrent versus exclusive jurisdiction. The previous grant of certiorari and remand to the California Court of Appeal in this case shows that the justices of this court view the reasoning of Tafflin as important new information for lower courts to consider on the question of whether a federal statute gives rise to concurrent jurisdiction.

For the simple reason that both the Pennsylvania and Maine cases precede this court's decision in Tafflin, they do not evaluate the question of jurisdiction in light of this court's reasoning. Accordingly, there is no conflict in decisions interpreting Tafflin, nor any

conflict among courts on the question of state court jurisdiction over PMPA claims, post-Tafflin. Because the conflict which exists is pre-Tafflin, it is not ripe for disposition by this court, which presumably would simply repeat its Tafflin reasoning.

II. The Court Below Correctly Followed the Reasoning Of This Court In Tafflin, Which Mandates The Holding That Jurisdiction Over PMPA Claims Is Concurrent.

In Tafflin the United States Supreme Court clarifies the strong presumption in favor of concurrent jurisdiction, rejecting arguments in favor of exclusive jurisdiction based on legislative intent, unless the jurisdictional issue is specifically debated by Congress.

Thus, this court reasoned:

> "Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. . . ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction." Tafflin, supra, 107 L.Ed.2d at 895-6.

Despite this court's clear exposition in Tafflin, Union cites debate by Con-

gressmen, who never mention jurisdiction, but merely argue the need for nationally uniform legislation.

The California Court of Appeal correctly characterized Union's citations as "random comments made during presentation of the legislation which do not directly discuss whether legislation "ousts the state courts of jurisdiction". . . (See page A 5 of Union's Petition for Writ of Certiorari.)

Union confuses a need for nationally uniform rules, which Congress must perceive whenever it passes controlling legislation, with the question of whether Congress intended to deprive the state courts of jurisdiction to enforce the PMPA. On the latter question, Congress was silent, and the reasoning of Tafflin

controls.

Furthermore, Union's argument implies that only federal judges may be trusted to enforce uniform national rules. It shows a deep distrust in state court judges, a distrust which Tafflin makes clear is not shared by this court. "Moreover contrary to petitioner's fear, we have full faith in the ability of state courts to handle the complexities of civil RICO actions. . ." Tafflin, supra, at 107 L.Ed.2d 898.

Finally, Union ignores the major thrust of Tafflin, that where Congress seeks to remedy a perceived national wrong, confinement of claims to the federal courts alone may frustrate Congress' broad remedial purpose. The PMPA was enacted to establish "protection for franchisees

from arbitrary or discrimination termination or non-renewal of their franchises". (S.Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 874) and to alleviate "the inherent disparity of bargaining power which exists between the franchisor and the franchisee" (S.Rep. No. 731, supra, at 17).

As this court stated in Tafflin:

> "Finally, we note that, far from disabling or frustrating federal interests, "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." Gulf Offshore, 453 US, at 478, n 4, 69 L.Ed.2d 784, 101 S.Ct. 519 (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, e.g., Pub.L. 91-452, § 904(a), 84 State. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); Sedima, 473 U.S., at 492, n. 10, 87 L.Ed.2d 346, 105 S.Ct. 3275 ("[I]f Congress' liberal-

construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather jeopardize federal policies underlying the statute."

III. Union's Petition For Writ of Certiorari Should Not Be Granted, To Avoid Putting the Imprimatur Of This Court On Union's Unethical Legal Strategy.

In this case, Union waited until after the state jury completed its deliberation following a three-week jury trial, and the judge awarded punitive damages for Union's willful breach of the PMPA, to then, for the first time, claim that the state trial court lacked jurisdiction over O'Riley's PMPA claims.

An ethical, good-faith litigant would have raised the issue before trial, so as

to avoid thousands of dollars of costs and hours of lost time.

While it is indisputable that jurisdiction cannot be waived, and can be raised even in this court, for the first time, it is also indisputable that if ever a litigant could be said to have agreed to a state forum, it is Union in this case. Union brought suit in state court. It waited to raise the issue of jurisdiction until after it lost.

Under the circumstances, Union's petition should be denied so as not to put the imprimatur of this court on Union's unethical legal posture.

CONCLUSION

This court need not again review this case. The California Court of Appeal has

now followed the guidance provided by this court in Tafflin. No conflict in decision exists post-Tafflin. Finally, this court should not grant Union's petition so as not to sanction Union's unethical strategy.

Respectfully submitted,

NEIL E. CAMPBELL, JR.
Attorney for Respondent